

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Mail Processing Network
Rationalization Service Changes, 2012

Docket No. N2012-1

**NATIONAL NEWSPAPER ASSOCIATION
MOTION TO COMPEL THE POSTAL SERVICE TO RESPOND TO NNA/USPS T1-12
and T1-13 AND TO PRODUCE A WITNESS TO ATTEST TO POLICY
ON WITHIN COUNTY SERVICE MEASUREMENT
(March 14, 2012)**

On March 2, 2012, the Postal Service filed an objection to two related interrogatories of the National Newspaper Association. NNA hereby requests that the Presiding Officer direct USPS to respond to these interrogatories and to provide a policy witness to address questions about Within County Service measurement if USPS T1 Witness Williams is not able to do so.

NNA asked the following:

NNA/USPS T1-12

"Please confirm that to comply with the Postal Accountability and Enhancement Act of 2006, USPS retained IBM as a consultant to study service standard compliance for Within County and that a report resulting from such study was supplied to the Postal Regulatory Commission. If you do not confirm, please explain why. If you do confirm, please identify the docket number and date of the filing of such report."

And NNA/USPS T1-13

"Please confirm that USPS conducts no separate studies of service standard compliance for Within County Periodicals mail but instead uses Outside County Periodicals mail data as a proxy."¹

¹ The Postal Service's objection contains a typographical error in the witness designation. NNA asked no questions of USPS witness T10, Michael Bradley. The interrogatory cited in the objection should have been NNA/USPS T1-13.

The Postal Service's objection cites no legal authority to support its objection, but appears to believe that if the documents sought were previously filed with the Commission, a request to supply the document in its possession under sponsorship of Mr. Williams in this docket somehow shifts a burden to the Service that rightfully belongs to NNA. Yet it confirms that the subject of NNA/USPS T1-13, at least, is relevant to the proceeding at hand:

"The fact that service standard changes are under review in the instant docket does bring within its scope such matters as the intricacies and mechanics of Periodicals service performance measurement." Objection of the United States Postal Service to National Newspaper Association Interrogatories, p.2.

NNA finds it perplexing that USPS agrees that the "intricacies and mechanics" of service measurement is relevant, yet declines to produce the requested documents or answer the questions.

1. No party waives the right to discoverable evidence simply by deciding not to participate in every previous docket.

Given that USPS finds the requested materials relevant, the grounds for objection seem to be that USPS has discussed the method of measuring Within County service in an earlier docket, and, having done so, wishes to do it no longer.

It states that service was discussed in ACR2011-1 and that intervenors are permitted to ask the Commission to seek responses to questions. It notes that the Commission is not compelled to ask those questions.

Whether questions might have been asked in ACR2011-1 and whether the Commission may or may not have found them worth propounding to the Service hardly constitute the

sort of privilege against discovery that would relieve USPS of the obligation to respond. Rather than simply answering the questions, the Service wants the Commission to rule that if NNA was not active in ACR2011-1, NNA has waived its right to participate fully in the instant docket.

The Commission's rules of discovery do not require parties to "use it or lose it" when exercising the right to participate through a long string of dockets. In the current environment of USPS fiscal stress, the volume of legal process USPS is producing before the Commission and before other policy bodies is unprecedented. Anyone witnessing the current workload must have sympathy not only for USPS counsel and this Commission, but for the entire mailing industry, for which litigation expense is an unrecoverable sunk cost during a time of shrinking print market share. For a small party like NNA, the expectation of participation in every docket where its interests may be affected is wholly unrealistic. NNA participates as its resources permit. If the Commission were to follow USPS's suggestion, the impact upon such smaller organizations would be to discourage participation at all, lest some new version of laches could truncate its rights and make any participation futile.

The rules clearly do not punish parties in such a way. They merely ask participants to formulate interrogatories "reasonably calculated to lead to the discovery of admissible evidence." 39 CFR § 3001.26. The fact that the evidence may have been previously discussed, as service standards now are in every Annual Compliance Review, does not make evidence any less likely to be admissible. If anything, it increases the likelihood of admissibility.

2. The requested documents and testimony are highly relevant and indispensable to the record.

NNA believes the information it seeks in the two interrogatories will be essential to its development of rebuttal testimony if the requested report and responses from a

sponsoring witness demonstrate that existing Within County performance is substandard and that USPS takes no actual measurements of Within County. If both premises are true, this information will be essential as well as to the Commission's understanding of current service performance and its analysis of the likely impact of weakening the standards further.

NNA assisted the Postal Service in developing the report it seeks in NNA/USPS T1-12. If NNA chooses to address the topic in rebuttal testimony, it would expect to show that following its participation, an embargoed version of a report on actual service provided Within County mailers was shown to Max Heath, chairman of NNA's Postal Committee. NNA repeatedly inquired of USPS and its consultant on the plans for disclosing the report publicly. Yet NNA was never notified of its filing, and use of the expected search terms "Within County" or "Newspaper Service Standards" on the search engine of the dockets on the PRC website do not produce a link to the report. The report does not appear in ACR 2011-1 documents. Thus, given that the Postal Service may have made the report to the Commission, NNA asked the Postal Service to confirm that the report was filed and disclose the time and docket in which it was filed.

3. A witness is needed to attest to USPS policy and to the history and relevance of the Within County service study.

Given the reluctance of the Service to permit its policy witness Williams to carry out a search for a report within USPS files, NNA requests not only that the report itself be compelled but that a witness capable of addressing it be provided to respond to NNA's questions during oral cross-examination, if Mr. Williams cannot. Since the study upon which the report is based is likely at least three years old, it is possible that Mr. Williams has no personal knowledge of it, and has not used it in developing testimony about the impact of new service standards. It is possible that he or another witness would attest that the report was completed, shelved and never used again. But whatever the current understanding of the Postal Service of the value of the study and its report, the Commission is entitled to examine both through the parties' discovery.

In addition to the report's inherent relevance, the question of the Postal Service's intent to rely upon any previous practice for Within County service measurement takes on an entirely different coloration than it might have at the time the study in question was conducted. Since that time, widespread announcements of post office closings, Sectional Center Facility closings, the planned end of Saturday delivery and other factors leading to a slow-down of the mail--particularly in the smaller, more rural areas that NNA newspapers serve--have intervened to rattle the confidence of mailers. For community newspaper mailers, serious concerns about the Postal Service's ability to deliver a time-sensitive mail piece have skyrocketed.

A citation to the public record in a previous docket, as NNA originally requested, would provide the Commission with a basis for examining past service. It might permit NNA to request that the desired report be incorporated by reference. It would permit NNA to ask witness Williams on the witness stand how and whether USPS plans to use the report. However, under the circumstances of the reluctance of the Service to provide simple responses, NNA ventures a guess that cross-examination of Mr. Williams on this topic would be unproductive and that another witness is needed to explain how Within County newspaper service will be carried out under new service standards. In the interest of moving the process forward more rapidly and avoid further motion practice, NNA now requests the Presiding Officer's direction to USPS to produce the requested report, which NNA believes to have been published in the spring or summer of 2010, based upon research done in 2009, and to provide a witness competent to address the conclusions of the study and its intended uses in future service measurement.

Respectfully submitted,

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